

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

APR 13 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Amendment of 47 C.F.R. § 1.1200)

et seq. Concerning Ex Parte)
Presentations in Commission)
Proceedings)

GC Docket No. 95-21

DOCKET FILE COPY ORIGINAL

COMMENTS OF U S WEST COMMUNICATIONS, INC.

U S WEST Communications, Inc. ("U S WEST"), through counsel and pursuant to the Federal Communications Commission's ("Commission") Notice of Proposed Rulemaking ("NPRM"),¹ hereby comments upon the proposed changes to the Commission's ex parte rules. U S WEST supports the Commission's goal of having ex parte rules that are simple and effective. But, simplicity and ease of application alone should not drive any change that undermines the public's confidence in the procedural integrity of Commission proceedings.

It is not apparent from a review of the Commission's proposed rule changes that, as a whole, adoption of the proposed rules will result in the creation of a simpler ex parte scheme. Further, while in some instances proposed rules will produce a more complete public record, other proposed rules seem to move in the opposite direction and raise serious questions concerning a party's ability to stay fully and timely informed as to information and arguments presented in proceedings that may be directed at determining that party's rights, obligations, liabilities or the manner in which it may conduct its business. U S WEST's comments on specific proposed rules are set forth below.

¹ See In the Matter of Amendment of 47 C.F.R. § 1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings, GC Docket No. 95-21, Notice of Proposed Rulemaking, FCC 95-52, rel. Feb. 7, 1995, and Order, DA 95-490, rel. Mar. 15, 1995.

No. of Copies rec'd
List A B C D E

025

DISCUSSION

A. Complaint Proceedings

The Commission proposes that it "treat as restricted proceedings only those required to be restricted by the APA and those specified as restricted by the Commission on a case-by-case basis."² It goes on to state that the applicable section of the APA "imposes a restriction on ex parte communications only in formal adjudications and rulemakings required to be determined on-the-record after an evidentiary hearing."³ Proposed Section 1.1208(a)(1), Restricted proceedings, provides, in part, that ex parte presentations are prohibited "in any Commission proceeding in which there has been release of an order designating an evidentiary hearing before an administrative law judge or the full Commission."⁴

Section 208 formal complaint proceedings are currently treated as restricted proceedings.⁵ To the extent that such proceedings are not designated for hearing, the Commission's proposed ex parte rules would make Section 208 formal complaint proceedings "permit-but-disclose" proceedings.⁶ This proposed change raises serious concerns. It is a rare occurrence in the recent past that the Commission has designated for hearing a complaint filed against a common carrier pursuant to Section 208 of the Communications Act⁷ and Section 1.720 et seq. of the Commission's rules.⁸ Although rarely designated for hearing, such proceedings, nonetheless, often result in the adjudication of substantial rights, obligations and liabilities between and among the parties. In fact, a formal complaint proceeding often adjudicates rights between private parties and, in such cases, the Commission sits as a surrogate for a federal district court.⁹ The potential consequences to the parties in formal complaint proceedings that have not been designated for an evidentiary hearing are not materially different than the potential consequences to parties in formal complaint proceedings that have been designated for hearing. U S WEST believes that the procedural

² NPRM at ¶ 13.

³ Id. at ¶ 15 (citation and footnote omitted).

⁴ See id. at APPENDIX B.

⁵ See 47 C.F.R. § 1.1208(c).

⁶ See NPRM at ¶ 29, n.17. See also id. at ¶ 22.

⁷ 47 U.S.C. § 208.

⁸ 47 C.F.R. § 1.720 et seq.

⁹ See 47 U.S.C. § 207.

differences between the way in which designated and nondesignated formal complaint proceedings are conducted is not a reasonable basis for applying the Commission's ex parte rules differently as between these adjudicatory proceedings. U S WEST urges the Commission to reconsider its proposal and retain its current rule that designates Section 208 complaint proceedings as restricted proceedings irrespective of whether or not a particular complaint proceeding has been designated for hearing.

The Commission has asked for comments as to whether Informal Complaints filed pursuant to Commission Rule 1.717¹⁰ should remain exempt from ex parte restrictions.¹¹ It is U S WEST's belief that to apply the ex parte restrictions to Section 1.717 Informal Complaint proceedings would unfavorably and fundamentally change the nature of these proceedings. Informal Complaints are most often filed by end-user customers that are unsophisticated with respect to Commission processes. For a complainant, there are not significant procedural barriers to getting an Informal Complaint before the Commission. Applying the ex parte restrictions to Informal Complaints would place an unneeded procedural barrier in the path of would-be complainants.

Most informal complaints are quickly resolved upon a speedy investigation of the facts by the carrier against which the complaint has been filed. Often it is necessary for the carrier to confer with the Commission's staff in order to secure basic information needed by the carrier in order to complete its investigation and prepare its response. Also, the facts are often not in dispute. Application of the ex parte restrictions will unnecessarily hamper the usually nonadversarial fact gathering process and likely delay the ultimate satisfaction of the complainant's complaint. Further, a complainant that is not satisfied with the disposition of an Informal Complaint has the right to convert its Informal Complaint to a Section 208 Formal Complaint and, in effect, secure a de novo hearing of its complaint in a formal adjudicatory proceeding. Accordingly, U S WEST recommends that the Commission continue to exempt Informal Complaint proceedings from its ex parte restrictions.

B. Department of Justice and Federal Trade Commission Presentations

On October 21, 1994, the Commission released an Order wherein it amended its ex parte rules "to provide an exemption for presentations between

¹⁰ 47 C.F.R. § 1.717.

¹¹ NPRM at ¶ 32.

the Commission and the Department of Justice or Federal Trade Commission relating to telecommunications competition matters."¹² In the NPRM, the Commission includes this previously conferred exemption for the Department of Justice ("DOJ") and Federal Trade Commission ("FTC") in proposed Section 1.1204(a)(6).¹³

U S WEST finds no discussion in the NPRM concerning the justification for such an exemption. In the Order, the Commission stated that such an exemption would promote the public interest through , among other things, the exchange of information and ideas between the Commission and the two agencies.¹⁴

The Commission is an independent regulatory agency with a separate statutory mandate. It is not of one piece with the DOJ or FTC. Even if exempting the DOJ and the FTC as the Commission proposes would facilitate communications between and among the agencies, the price would be closed government deliberations (among nonidentical parties) on matters of importance to parties to the proceedings and the general public. Indeed, it is difficult to imagine why the requirement that DOJ and FTC comments in public proceedings be made public under the ex parte rules would inhibit presentations by those agencies. Only the most compelling of circumstances should be used to justify shutting the public out from inter-agency deliberations on matters that are the subject of "open" public proceedings. It does not appear that such compelling circumstances exist here. If the DOJ or the FTC has facts, data or arguments that are germane to the Commission's deliberations in an open proceeding, it must be presumed that those same facts, data and arguments are equally of interest to parties to the proceeding. There is no compelling governmental interest in denying parties to an open proceeding the benefit of the information or viewpoints shared with the Commission by the DOJ or the FTC, or to deny parties the opportunity to comment, favorably or unfavorably, on such information or viewpoints. Nor is such secrecy contemplated by the law.

Neither the DOJ nor the FTC is deprived of its opportunity to fully and completely protect the public interest by adhering to the same ex parte restrictions as other parties to a proceeding. To confer a special status upon the

¹² In the Matter of Amendment of the Commission's Ex Parte Rules, Order, 9 FCC Rcd. 6108 ¶ 1 (1994).

¹³ See NPRM at APPENDIX B.

¹⁴ Order, 9 FCC Rcd. at 6108 ¶ 2.

DOJ and FTC in this context will invariably lead to public suspicion concerning closed-door inter-agency communications and decision-making. This will occur even when there have been no inter-agency communications since parties and the public cannot be assured that they know when inter-agency communications have taken place. There is a great potential for erosion of the public's confidence in the open rulemaking process.

U S WEST strongly urges the Commission to reconsider its ex parte exemption for the DOJ and FTC, as well as its general exemption for presentations to or from an agency or branch of the Federal Government or its staff as to matters over which such agency or branch and the Commission share jurisdiction.¹⁵ The character of the proceeding, not the character of the party, should determine the appropriateness of applying or not applying the Commission's ex parte restrictions.

Respectfully submitted,

U S WEST COMMUNICATIONS, INC.

By: Robert B. McKenna / RBP
Robert B. McKenna
Suite 700
1020 19th Street, N.W.
Washington, DC 20036
303/672-2861

Its Attorney

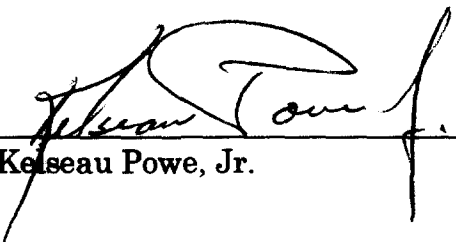
Of Counsel,
Laurie J. Bennett

April 13, 1995

¹⁵ Proposed Rule § 1.1204(a)(5), NPRM at APPENDIX B.

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 13th day of April, 1995, I have caused a copy of the foregoing **COMMENTS OF U S WEST COMMUNICATIONS, INC.**, to be served via hand-delivery, upon the persons listed on the attached service list.


Kelseau Powe, Jr.

James H. Quello
Federal Communications Commission
Room 802
1919 M Street, N.W.
Washington, DC 20554

Andrew C. Barrett
Federal Communications Commission
Room 826
1919 M Street, N.W.
Washington, DC 20554

Reed E. Hundt
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, DC 20554

Susan P. Ness
Federal Communications Commission
Room 832
1919 M Street, N.W.
Washington, DC 20554

Rachelle B. Chong
Federal Communications Commission
Room 844
1919 M Street, N.W.
Washington, DC 20554

Office of General Counsel
Federal Communications Commission
Room 610
1919 M Street, N.W.
Washington, DC 20554

William E. Kennard
Federal Communications Commission
Room 614-B
1919 M Street, N.W.
Washington, DC 20554

David S. Senzel
Federal Communications Commission
Room 610
1919 M Street, N.W.
Washington, DC 20554

**International Transcription
Services, Inc.**
Room 246
1919 M Street, N.W.
Washington, DC 20554

Kathleen M. H. Wallman
Federal Communications
Commission
Room 500
1919 M Street, N.W.
Washington, D.C. 20032